NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dillon Companies, Inc. d/b/a King Soopers and Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 5-920. Case 27— CA-17309

#### June 8, 2001

## DECISION AND ORDER

# BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

Pursuant to a charge filed on February 15, 2001, the Acting General Counsel of the National Labor Relations Board issued a complaint on March 15, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to bargain following the Decision and Order Clarifying Unit in Case 27–UC–200. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On April 27, 2001, counsel for the Acting General Counsel filed a Motion for Summary Judgment. On May 3, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the Board's unit determination in the underlying unit clarification proceeding. Specifically, the Respondent argues that the Decision and Order Clarifying Unit incorrectly included in the existing unit pharmacists employed by the Respondent at 12 separate locations.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate* 

*Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

## I. JURISDICTION

At all material times, the Respondent, a corporation with various facilities in the State of Colorado, has been engaged in the retail sale of groceries and related items.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of \$500,000, and purchases and receives goods, materials, and services valued in excess of \$5000 from points located directly outside the State of Colorado.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the pharmacy unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries, and supervisors as defined in the Act, and all other employees.

Since at least 1989, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the pharmacy unit, and the Respondent has recognized the Union as the representative. This recognition has been embodied in successive collective-bargaining agreements for the pharmacy unit, the most recent of which is effective from March 29, 1999, through January 25, 2003. Since at least 1989, and at all material times, the Union, based on Section 9(a) of the Act, has been, and is now, the exclusive representative of the pharmacy unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On July 12, 2000, the Union filed a petition in Case 27–UC–200 seeking clarification of the unit to include in the existing unit, pharmacists employed by the Respondent at 12 separate locations.

On August 23, 2000, the Regional Director issued a Decision and Order granting the Union's request to clarify the unit to include the petitioned-for pharmacists in

dispute. The Respondent filed a request for review which the Board denied on January 18, 2001.

# Refusal to Bargain

Since on about February 15, 2001, the Respondent has failed and refused to recognize the Union as the exclusive collective-bargaining representative of the employees in the pharmacy unit who were the subject of the Regional Director's unit clarification decision, and since that date the Respondent has refused to apply the collective-bargaining agreement to those employees. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

# CONCLUSION OF LAW

By refusing on and after February 15, 2001, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the pharmacy unit who were the subject of the Decision and Order Clarifying Unit in Case 27–UC–200, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize the Union as the collective-bargaining representative of the employees who were the subject of the Decision and Order Clarifying Unit in Case 27–UC–200, and to apply the existing contract to them.

## **ORDER**

The National Labor Relations Board orders that the Respondent, Dillon Companies, Inc., d/b/a King Soopers, Denver, Colorado, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to bargain with Paper, Allied-Industrial, Chemical and Energy Workers International Union, Iocal 5920 as the exclusive bargaining representative of the employees in the bargaining unit set forth below who were the subject of the Decision and Order Clarifying Unit in Case 27–UC–200.
- (b) In any like or elated manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate bargaining unit who were the sub-

ject of the Decision and Order Clarifying Unit in Case 27–UC–200:

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by the Employer within the State of Colorado, excluding all office and store clericals, all confidential secretaries, and supervisors as defined in the Act, and all other employees.

- (b) Apply the existing collective-bargaining agreement to the employees who were included in the bargaining unit by the Decision and Order Clarifying Unit in Case 27–UC–200.
- (c) Within 14 days after service by the Region, post at its facilities in Colorado covered by the collective bargaining agreement, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2001.
- (d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 8, 2001

Peter J. Hurtgen,	Chairman
John C. Truesdale,	Member
Dennis P. Walsh,	Member

## (SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>&</sup>lt;sup>1</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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# APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Paper, Allied-Industrial, Chemical, and Energy Workers International Union, Local 5920, as the exclusive representative of the employees in the bargaining unit set forth below who were the subject of the Decision and Order Clarifying Unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate bargaining unit who were the subject of the Decision and Order Clarifying Unit:

All full-time, regular part-time, and intern pharmacists hired with five (5) years of education required to become pharmacists, employed by us within the State of Colorado, excluding all office and store clericals, all confidential secretaries, and supervisors as defined in the Act, and all other employees.

WE WILL apply the collective-bargaining agreement to the employees who were included in the bargaining unit by the Decision and Order Clarifying Unit.

DILLON COMPANIES, INC D/B/A KING SOOPERS